

THE HONORABLE THOMAS S. ZILLY

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

AT&T MOBILITY LLC, a Delaware limited liability corporation,

No. C10-468Z

VS

ORDER

HOLADAY-PARKS-FABRICATORS, INC.,
a Washington corporation,

Defendant.

V.

EVERGREEN POWER SYSTEMS, INC., a
Washington corporation, et al.,

Third-Party Defendants.

This matter comes before the Court on Third Party Defendant Evergreen Power

Systems, Inc.’s (“Evergreen”) Motion for Summary Judgment, docket no. 71:

Evergreen's Motion to Exclude Holaday-Parks' "Supplemental" Expert Report, docket

1 no. 74; and Holaday-Parks' Motion for Summary Judgment against Evergreen, docket no.
2
3 92. For the reasons discussed below, the Court GRANTS in PART and DENIES in
4 PART Evergreen's Motion for Summary Judgment. The Court DENIES Evergreen's
5 Motion to Exclude Holaday-Parks' "Supplemental" Expert Report, and DENIES
6 Holaday-Parks' Motion for Summary Judgment.

7 **I. Background**

8 On August 1, 2008, 16,000 gallons of diesel fuel overflowed from an above-
9 ground storage tank at AT&T's Bothell Data Center. Compl. at ¶¶ 4, 12 (docket no. 1).
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11 On March 19, 2010, AT&T Mobility LLC ("AT&T") filed suit against Holaday-Parks,
12 the contractor who had installed the fuel system. On April 12, 2010, Holaday-Parks
13 filed a third-party complaint against Evergreen, its electrical subcontractor, Source
14 North America Corporation, which supplied the fuel control system, and Phillips Pump,
15 LLC, which manufactured the fuel control system. Def. Answer and Third Party
16 Compl. (docket no. 7).

17 AT&T claims that the cause of the spill was a defective fuel system designed
18 and installed by Holaday-Parks. See Compl. at ¶¶ 19-20. Holaday-Parks, in turn,
19 alleges breach of contract, breach of warranty, negligence, indemnity, and contribution
20 against Evergreen, claiming that Evergreen's subcontractor, Gerber Engineering
21 ("Gerber") installed the wrong wire, and that the installation of the wrong wire may
22 have been one of the causes of the spill. Def. Answer and Third Party Compl. ¶¶ 11-13;
23 Response at 2-4 (docket no. 76).

1 Evergreen now moves for summary judgment against Holaday-Parks, arguing
2 that (1) Holaday-Parks cannot prove breach of contract, breach of warranty, and breach
3 of indemnity; (2) Holaday-Parks' negligence claim should be dismissed because
4 Holaday-Parks cannot point to an independent tort duty breached by Evergreen; and (3)
5 Holaday-Parks' contribution claim should be dismissed because AT&T has not sued
6 Holaday-Parks in tort. Holaday-Parks moves for summary judgment against Evergreen,
7 relying on the same arguments and documents it submitted in support of its Response to
8 Evergreen's motion for summary judgment. Evergreen also moves to exclude Holaday-
9 Parks' expert report on the basis that it does not comply with Fed. R. Civ. P. 26(b)(2)
10 and Fed. R. Evid. 702, and to exclude Holaday-Parks' supplemental expert report on the
11 basis that it is untimely.

14 **II. DISCUSSION**

15 **A. Standard of Review**

16 The Court shall grant summary judgment if no genuine dispute of material fact
17 exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
18 56(a). The moving party bears the initial burden of demonstrating the absence of a
19 genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A
20 fact is material if it might affect the outcome of the suit under the governing law.
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22 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In support of its motion for
23 summary judgment, the moving party need not negate the opponent's claim, Celotex,
24 477 U.S. at 323; rather, the moving party will be entitled to judgment if the evidence is
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1 not sufficient for a jury to return a verdict in favor of the opponent, Anderson, 477 U.S.
2 at 249. To survive a motion for summary judgment, the adverse party must present
3 affirmative evidence, which “is to be believed” and from which all “justifiable
4 inferences” are to be favorably drawn. Id. at 255, 257. When the record, taken as a
5 whole, could not lead a rational trier of fact to find for the non-moving party, summary
6 judgment is warranted. See, e.g., Beard v. Banks, 548 U.S. 521, 529 (2006).

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8 **B. Holaday-Parks' Breach of Contract Claim, Breach of Warranty Claim,
9 and Indemnity Claim**

10 In its motion for summary judgment, Evergreen challenges all of Holaday-Parks'
11 causes of action on the theory that Holaday-Parks cannot establish breach and causation
12 based on Holaday-Parks' expert Jon Mathison's expert report because the report fails to
13 comply with the disclosure rules under Fed. R. Civ. P. 26(b)(2) and because it is
14 inadmissible under Fed. R. Evid. 702.

16 However, Holaday-Parks does not rely solely on Mr. Mathison's report to
17 demonstrate that a material issue of fact exists as to whether Evergreen, and
18 Evergreen's subcontractor Gerber, were responsible for the fuel spill. Instead,
19 Holaday-Parks points to depositions of fact witnesses and other documents. See, e.g.,
20 Report of James O'Keeffe at 10, 34, Ex. B to Decl. of Jeffery D. Laveson in Supp. of
21 Def Holaday-Parks' Opp'n. to Summ. J. (“Laveson Decl.”) (docket no. 77) (indicating
22 that installation of the wrong wire may have led to the spill); Generator Building – Fuel
23 Control System Diagram, Ex. J to Laveson Decl. (demonstrating that Gerber specified
24 the wire at issue); Stathum Deposition at 101:25 – 202:3, Ex. E to Laveson Decl.
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1 (describing that Evergreen employee Steve Stathum was involved in reconnecting the
2 fuel level sensor circuit two days before the spill, without checking to make sure it
3 functioned properly afterwards); Ex. L to Decl. of Laveson Decl. (Gerber deposition
4 excerpts). Because Evergreen only challenges Holaday-Parks' claims in its Motion for
5 Summary Judgment by challenging the admissibility of an expert report and because
6 Holaday-Parks has presented evidence which creates a material issue of fact as to
7 whether Evergreen and its subcontractor Gerber were responsible for the spill,
8 Evergreen is not entitled to summary judgment as a matter of law on Holaday-Parks'
9 Breach of Contract, Breach of Warranty Claim, and Indemnity claims. Accordingly,
10 the Court denies Evergreen's motion as to these claims.

13 **C. Holaday-Parks' Motion to Disregard New Issues Raised in Reply**

14 Evergreen, for the first time in its Reply, challenges Holiday-Parks' claims
15 individually, arguing, among other things, that (1) Holaday-Parks fails to point to a
16 contract term that was breached; (2) Holaday-Parks did not respond to Evergreen's
17 motion to dismiss its breach of warranty claims; and (3) AT&T's claims against
18 Holaday-Parks do not fall within the terms of the indemnity clause. Holaday-Parks has
19 moved that the Court disregard these new issues or allow Holaday-Parks to submit
20 further briefing. Holaday-Parks' Surreply to Evergreen's Reply at 2 (docket no. 85);
21 see also Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154, 1171 (W.D. Wash. 2010)
22 (granting the motion to strike arguments made in reply and explaining that
23 “[a]rguments cannot be raised properly for the first time on reply.”). Because the Court
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1 agrees that these arguments are made for the first time in Evergreen's Reply, the Court
2 grants Holaday-Parks' motion and disregards these new issues.
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4 **D. Holaday-Parks' Negligence Claim**

5 Evergreen argues that Holaday-Parks' negligence claim should be dismissed
6 because Holaday-Parks can point to no independent tort duty to Holaday-Parks which
7 was breached by Evergreen. Evergreen is correct.

8 Both parties agree, citing the plurality opinion in Eastwood v. Horse Harbor
9 Foundation, Inc., 170 Wn.2d 380, 393-94 (2010), that the relevant inquiry in
10 determining whether economic losses are recoverable in tort, even when they arise from
11 contractual relationships, is whether a duty existed independent of the contract. For
12 example, in Affiliated FM Ins. Co. v. LTK Consulting Services. Inc., 170 Wn.2d 442
13 (2010), the court held that an engineering contractor had a duty of reasonable care to a
14 Seattle Monorail concessionaire who had a legally protected interest in the Monorail,
15 which was damaged by fire due to the engineering contractor's negligence, and who
16 had claimed economic loss for lost business profits during the monorail's shutdown.

17 Id. at 456-58.

18 Holaday-Parks contends that recovery for catastrophic property damage, like the
19 damage from the fuel spill at issue here, has never been precluded by the general rule
20 limiting parties governed by contract to their contractual damages. Holaday-Parks may
21 well be correct; however, it has failed to show how property damage to AT&T
22 somehow implicates a tort duty running from Evergreen to Holaday-Parks. Indeed,
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1 Holaday-Parks does not allege it suffered damages of its own; it seeks only
2 indemnification from claims brought against it by AT&T. Accordingly, no independent
3 tort duty between Holaday-Parks and Evergreen exists, and Holaday-Parks' Negligence
4 claim is dismissed.¹
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6 **E. Holaday-Parks' Contribution Claim**

7 "Under the principle of 'contribution,' a tortfeasor against whom a judgment is
8 rendered is entitled to recover proportional shares of judgment from other joint
9 tortfeasors whose negligence contributed to the injury and who were
10 also liable to the plaintiff." Black's Law Dictionary 328 (6th ed. 1990) (citing Dawson
11 v. Contractors Transport Corp., 467 F.2d 727, 729 (D.C. Cir. 1972)); see also, RCW
12 4.22.070. In this case, AT&T has brought only breach of contract claims against
13 Holaday-Parks; it has not brought a tort claim. Complaint (docket no. 1). Because a
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18 ¹ Holaday-Parks' argument in the alternative, that Steve Stathum was not acting under
19 the Holaday-Parks-Evergreen subcontract when he negligently reconnected the faulty
20 fuel level sensor circuit and that thus Holaday-Parks' negligence claim, as it relates to
21 this negligence, is not precluded under the economic loss rule because no contract
22 existed, at best shoots Holaday-Parks in the foot. If it was true that Evergreen's
23 employee was acting outside of the subcontract, then Evergreen cannot be liable for his
24 actions. See Thompson v. Everett Clinic, 71 Wn.App. 548, 551 (Div 1, 1993) ("In
25 order to hold an employer vicariously liable for the tortious acts of its employees, it
26 must be established that the employee was acting in furtherance of the employer's
business and that he or she was acting within the course and scope of employment when
the tortious act was committed."). Holaday-Parks cannot have it both ways; either Mr.
Stathum was working for Evergreen when he reconnected the fuel level, in which case
the existence of the subcontract bars a tort claim against Evergreen, or Mr. Stathum was
working outside of the scope of his employment with Evergreen, in which case
Holaday-Parks may not hold Evergreen liable for his negligence.

1 claim of contribution is predicated on tort liability, Holaday-Parks' contribution claim
2 is dismissed as a matter of law.²
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4 **F. Holaday-Parks Motion for Summary Judgment against Evergreen**

5 Holaday-Parks also moves for summary judgment against Evergreen, docket no.
6 92. Holaday-Parks admits that “[t]he issues raised [in the motion] are, in large part,
7 identical to those briefed in Holaday-Parks' Opposition to Evergreen's Motion for
8 Summary Judgment.” Indeed, Holaday-Parks' motion for summary judgment largely
9 repeats its Response to Evergreen's motion for summary judgment.
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11 Holaday-Parks asks the Court to rule, on summary judgment, that it was
12 Evergreen who caused the fuel spill at AT&T's campus and that therefore Evergreen
13 must indemnify Holaday Parks for damages awarded to AT&T. This result is called
14 into question by Holaday-Parks' own pleadings, which identify Source North America
15 Corporation and Philips Pump as also playing a role in the fuel spill; its admission in
16 response to Source North America Corporation's motion for summary judgment that
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18² Holaday-Parks' argument, that the principal/agent exception to RCW 4.22.070's
19 general abolition of joint and several liability applies in this case, is without merit. In
20 general, RCW 4.22.070, a product of the 1986 Tort Reform Act, requires that, “[i]n all
21 actions involving fault of more than one entity, the trier of fact shall determine the
22 percentage of the total fault which is attributable to every entity which caused the
23 claimant's damages....” This is true except that, under RCW 4.22.070(a), “[a] party
24 shall be responsible for the fault of another person or for payment of the proportionate
25 share of another party where both were acting in concert or when a person was acting as
26 an agent or servant of the party.” Holaday-Parks fails to explain how this exception to a
tort statute possibly applies in the context of a contractual indemnity action brought by
AT&T against Holaday-Parks, where no tort claims have been brought. Moreover,
Holaday-Parks fails to elucidate how Evergreen is Holaday-Parks' agent. See also,
Kamla v. Space Needle Corp., 147 Wn.2d 114, 119 (2002) (discussing the distinction
between independent contractors and agents).

1 “[c]ausation has not yet been determined”;³ and its own expert report, which identifies
2 the “primary causation issues” as being (1) “AT&T’s failure to authorize installation of
3 an overflow return piping system between day tanks and the main storage tank as
4 advised by the commissioning agent”, and (2) “the troubleshooting and reconnection of
5 the fuel sensor wiring by unqualified AT&T personnel.” Report of John Mathison at 7,
6 Ex 2 to Decl. of Shilpa Bhatia in Supp. of Evergreen Power Systems’ Mot. for Summ.
7 J. (“Shilpa Decl.”) (docket no. 72-1). Holaday-Parks’ own pleadings, admission, and
8 evidence create an issue of material fact as to whether and to what extent Evergreen is
9 liable. The Court accordingly DENIES Holaday-Parks’ motion for summary judgment.

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12 **G. Evergreen’s Motions to Exclude Holaday-Parks’ Original and**
Supplemental Expert Reports

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14 Evergreen moves to exclude Jon Mathison’s expert report because it fails to
15 comply with Fed. R. Civ. P. 26(b)(2) and Fed. R. Evid. 702. Evergreen also moves to
16 exclude Mr. Mathison’s supplemental report on the basis that it is untimely.

17 *1. Jon Mathison’s Original Report*

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19 Evergreen complains that Jon Mathison’s expert report fails to comply with the
20 disclosure rules as laid out in Fed. R. Civ. P. 26(a)(2) and admissibility requirements
21 under Fed. R. Evid. 702, and that therefore the report should be excluded under Fed. R.
22 Civ. P. 37(c). Holaday-Parks responds that the omissions from the report are harmless

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26 ³ Response to Source North America Corporation’s Mot. for Summ. J. (docket
no. 94).

1 and that therefore failure to strictly comply with Rule 26(a)(2) is not grounds to
2 disqualify the report.

3 Fed. R. Civ. P. 26(a)(2)(B) requires that written reports from an expert
4 witness must contain:

- 6 (i) a complete statement of all opinions the witness will express and
7 the basis and reasons for them;
- 8 (ii) the facts or data considered by the witness in forming them;
- 9 (iii) any exhibits that will be used to summarize or
10 support them;
- 11 (iv) the witness's qualifications, including a list of all
12 publications authored in the previous 10 years;
- 13 (v) a list of all other cases in which, during the previous 4 years, the
14 witness testified as an expert at trial or by deposition; and
- 15 (vi) a statement of the compensation to be paid for the
16 study and testimony in the case.

17 If a report fails to disclose the information required by Rule 26(a), Fed. R. Civ. P. 37(c)
18 “gives teeth to these requirements” by preventing the party from using “that
19 information or witness to supply evidence on a motion, at a hearing, or at a trial, unless
20 the failure was substantially justified or is harmless.” Yeti by Molly, Ltd. v. Deckers
21 Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2011); Fed. R. Civ. P. 37(c)(1). The trial
22 court is given broad discretion over whether to admit expert testimony. U.S. v. Hankey,
23 203 F.3d 1160, 1168 (9th Cir. 2000).

24 Evergreen moves to exclude Mr. Mathison's report on the basis that the report
25 does not include a list of publications, list of prior testimony, information on
26 compensation, or Mr. Mathison's signature. It also claims that the report does not give
the basis and reasons for Mr. Mathison's opinions.

1 The lack of background information on Mr. Mathison – the lack of a list of
2 publications, prior testimony, information on compensation, and Mr. Mathison’s
3 signature – is harmless error. Responding to these issues, Holaday-Parks claims that (1)
4 Mr. Mathison has no relevant publications to disclose, nor prior testimony experience;
5 (2) he included his rates in his supplemental report; and (3) he included his electronic
6 signature on the original report, just not a handwritten one, and he has included a
7 handwritten signature in his supplemental report. Accordingly, none of the omissions
8 prejudice Evergreen. Evergreen will not be unprepared to ask Mr. Mathison about his
9 prior publications or testimony; he has none. See Abel v. City of Algona, No. 07-956,
10 2008 WL 3545048, at *2 (W.D. Wash. Aug. 8, 2008) (finding no error when expert
11 who had not authored publications failed to list publications).

14 The lack of basis and reasons for Mr. Mathison’s opinions, however, is more
15 problematic. The opinions at issue state the following:

17 Gerber Engineering breached the standard of care in failing
18 to re-specify wire types from #12AWG to twisted shielded
19 pair once notified that the transducer had been changed to 4-
20 mA.

22 Evergreen Electric breached the standard of care [sic] in
23 failing to use twisted shielded pair to connect the level
24 transducers (4-20 mA signals) to analog transducers.

26 Shilpa Decl. Ex 2 at 7. To satisfy Fed. R. Civ. P. 26(a)(2)(B) the report must provide
27 “the basis and reasons” for the opinions. Mr. Mathison’s opinions are clearly
28 insufficient. The opinions “offer little or no explanation of the basis of the opinions or

1 the methodology by which they were reached.” Cohlmia v. Ardent Health Services,
2 LLC, 254 F.R.D. 426, 430 (N.D. Okla. 2008).

3 Although Mr. Mathison’s conclusory opinions fail to fully comply with the
4 requirements of Fed. R. Civ. P. 26(a)(2)(B), the Court declines to impose the harsh
5 sanction of exclusion. There is no need to formally exclude the report from
6 consideration on Evergreen’s summary judgment motion; Holaday-Parks does not rely
7 on it to defeat the motion. Moreover, Mr. Mathison was deposed for approximately
8 seven hours – ample time to elicit the reasoning behind his opinions. Accordingly,
9 Evergreen is unlikely to be prejudiced at trial by the need to guess at the basis for Mr.
10 Mathison’s opinion, or by Holaday-Parks “sandbag[ging]” Evergreen “with claims and
11 issues which should have been included in the expert witness’ initial report.” Smith v.
12 Ardew Wood Products, Ltd., C07-5641, 2009 WL 799679, at *2 (W.D. Wash., Mar. 24,
13 2009). The failure to fully comply with Fed. R. Civ. P. 26(a)(2)(B) is therefore
14 harmless, and Evergreen’s motion to exclude is denied.

15 2. *Jon Mathison’s Supplemental Report*

16 Jon Mathison’s supplemental report incorporates deposition testimony of Gary
17 Gerber taken on August 5, 2011. Because the supplemental report was submitted on
18 September 15, 2011, after the expert disclosure deadline of June 29, 2011, Evergreen
19 moves to exclude the supplemental report as untimely.

20 Fed. R. Civ. P. 37(c) provides for the exclusion of late expert reports unless the
21 delay was harmless or substantially justified. It is within the district court’s discretion
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1 to issue sanctions under the rule. See Jarritos, Inc. v. Ramos, 345 Fed. Appx. 215, 217
2 (9th Cir. 2009) (upholding exclusion of expert report submitted after deadline).
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4 Holaday-Parks argues that Mr. Mathison's supplemental report is both
5 substantially justified because it responds to a deposition taken after the expert
6 disclosure deadline, and harmless because, since the supplemental report does not
7 represent a change in Mr. Mathison's opinions, only a deepening of the basis for them
8 based on Mr. Gerber's deposition, it should cause no delay in the case schedule. In this
9 case Mr. Mathison was deposed on September 16, 2011, for approximately seven hours,
10 after the supplemental report had been disclosed. Any delay in the initial disclosure of
11 the supplemental report was therefore harmless.
12

13 **III. CONCLUSION**

14 (1) The Court hereby GRANTS in PART and DENIES in PART Evergreen's
15 Motion for Summary Judgment, docket no. 71:

16 a. Evergreen's motion to dismiss Holaday-Parks' Breach of Contract
17 Claim, Breach of Warranty Claim, and Indemnity Claim is DENIED;
18 and
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20 b. Evergreen's motion to dismiss Holaday-Parks' Negligence Claim and
21 Contribution Claim is GRANTED. Holaday-Parks' Negligence Claim
22 and Contribution Claim against Evergreen are DISMISSED.

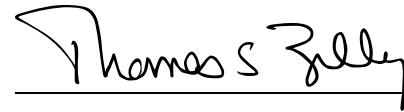
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24 (2) The Court hereby GRANTS Holaday-Parks' motion that the Court disregard
25 new issues raised by Evergreen for the first time in its Reply, docket no. 85.
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1 (3) The Court hereby DENIES Holaday-Parks' Motion for Summary Judgment
2 against Evergreen, docket no. 92.
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4 (4) The Court hereby DENIES Evergreen's Motion to Exclude Holaday-Parks'
5 Expert Report and "Supplemental" Expert Report, docket no. 74.

6 IT IS SO ORDERED.

7 DATED this 17th day of November, 2011.

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11 Thomas S. Zilly
12 United States District Judge
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